BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31928
	)	
CLAYTON CARTER	)	**BOARD DECISION**
	)	(Precedential)
From 10 working days' suspension	)	
in the position of State Traffic	)	**NO. 94-21**
Sergeant with the Department of	)	
California Highway Patrol at	)	
San Diego	)	July 6, 1994

Appearances: John D. Markey of the California Association of Highway Patrolmen representing Appellant, Clayton Carter; Dana T. Cartozian, Deputy Attorney General representing Respondent, California Highway Patrol.

Before: Carpenter, President; Ward, Vice President, Stoner and Bos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Clayton Carter (appellant). Appellant, a Sergeant with the Department of California Highway Patrol (Department), was suspended for 10 working days by the Department for participating in inappropriate sexual banter with a subordinate officer and for grabbing that same officer by the buttocks and kissing her while off-duty at a Department retirement dinner.

In her Proposed Decision, the ALJ found that appellant had acted as alleged above and further held that this behavior constituted, among other violations, sexual harassment. The ALJ, modified the appellant's penalty to an official reprimand, however,

on the grounds that appellant and the subordinate officer had established more than a strictly business relationship between themselves and the fact that appellant had already been "punished" for the kiss when the subordinate officer slapped the appellant in the face.

The Board rejected this decision as it was concerned with the fact that the ALJ had found that appellant had committed sexual harassment, a serious charge, but had reduced the penalty to an official reprimand. After a review of the record, including the transcript and the written arguments of the parties,[1] the Board finds that appellant's conduct constitutes discourteous treatment of other employees and a failure of good behavior, but does not constitute sexual harassment. The Board further finds that an official reprimand is an appropriate penalty under all of the circumstances.

FACTUAL SUMMARY

Appellant was appointed a State Traffic Officer with the Department in 1980. He was promoted to the position of State Traffic Sergeant in 1988. He has one prior adverse action, a one working day suspension in 1989, for the negligent discharge of a gun and failure to report the incident.

In 1991, appellant's duties included supervising State Traffic Officer Suzanne Adams. From January through June 1991, the two

[1] Oral argument was waived by the parties.

worked together, both patrolling the streets and in the office performing office duties. At some point, during a discussion about the payment of high taxes, a coworker suggested to appellant and Adams that they get married to save themselves money on income tax. From that time on, the idea of appellant and Adams as a married couple became an "inside joke" between them. On occasion, appellant and Adams would address each other in the office as "husband and wife" or use other terms of endearment that married couples generally use (e.g. "honey", "dear"). Following this pattern of jest, appellant routed paperwork to Adams one day with a route memo that said "to Suzi aka honey from S-10 aka sweetie."

This bantering generally did not go beyond these simple exchanges. On one occasion, however, appellant loudly asked Adams in front of other people why she did not come home last night, stating that, as a result, he had had to sleep on the couch. Although appellant claimed he was only playing on their "inside joke" and did not see anyone nearby at the time, two coworkers who heard this statement encountered Adams afterwards and asked what was going on between them. Adams became very embarassed and had to explain to them that nothing was going on between them.

The final incident alleged occurred when appellant and Adams attended a retirement dinner at a local hotel for a fellow Department employee. As appellant was leaving the dinner with coworker Officer Sheryl Garinger, she stopped in the hallway to say

goodbye to appellant and two other officers who were talking with appellant, Stephen Vail and Joe Garrison. As Adams went to shake Garrison's hand goodbye, Garrison leaned over to kiss her. Adams quickly turned her head so that Garrison kissed her goodbye on the cheek. Adams claimed that she was not offended by Garrison's gesture. After Adams shook Vail's hand goodbye, she turned to shake appellant's hand when she claims appellant grabbed her by the buttocks, pulled her tightly next to him, and tried to kiss her on the lips. Adams once again turned her head and appellant ended up kissing her on the cheek.

In response to this action, Adams slapped appellant on the face. Appellant exclaimed "whoa" and Adams proceeded down the hallway and left the hotel. After this occurred, nothing specific was ever said between appellant and Adams concerning the incident, however, appellant did bring up the general subject of sexual harassment on one occasion. According to appellant, Adams assured appellant that the incident would not be mentioned in the future. According to Adams, she did not take further action concerning the incident as she felt like she had taken care of it by slapping the appellant on the face. Two months after this incident, Adams asked to be transferred out of appellant's unit and eventually did transfer.

Appellant denies grabbing and kissing Adams. Instead, appellant testified that all he did was reach out and pinch Adams

on the buttocks as a joke to retaliate for a time the previous month when she had pinched him.

As to the other witnesses present, Officer Garinger testified to seeing the kiss and the slap and to seeing appellant's hand near Adams' buttocks. She also testified that she could not tell if appellant actually grabbed Adams' buttocks. Officers Vail and Garrison, who were also standing just a few feet away, claimed they were engaged in conversation and did not see anything happen, including the kiss or the slap.

Appellant now regrets their "couple" bantering, including the statement he made to Adams about her not coming home to sleep, but states that it was all done in fun and that nothing sexual ever transpired in these conversations. He also regrets pinching Adams at the retirement party, and while not claiming to be drunk, he did state that he was in the process of drinking his third beer, and does not drink very often.

Based on the above incidents, the Department suspended appellant for 10 working days and charged him with causes for discipline under Government Code section 19572 (m) discourteous treatment of the public and other employees, (t) failure of good behavior, and (w) discrimination on the basis of sexual harassment.[2]

[2] The Department also charged (f) dishonesty and (q) violation of this Board rule or rule 172. The charge of violation of (f) is dismissed as there is insufficient evidence that appellant acted dishonestly and (q) is dismissed pursuant to the Board's Precedential Decision in Donald McGarvie (1993) SPB Dec. No. 93-06.

ISSUES

1. Were the charges supported by a preponderance of evidence?

2. Is formal discipline appropriate for the charges and, if so, on what grounds?

3. Assuming formal discipline is appropriate, what is the proper penalty?

DISCUSSION

Preponderance of Evidence

Appellant admits that he engaged in the mutual bantering of "husband and wife" jokes with Adams, made the remark to Adams concerning her not coming home and wrote her the "sweetie" route slip. He denies grabbing and kissing Adams though, and instead claims he only pinched her in jest. Thus, the only issue of fact to be decided by the Board is whether Adams was grabbed and kissed by the appellant or just pinched.

After reviewing the record, we find support for the ALJ's finding that appellant grabbed and kissed Adams at the retirement party.

For one, we note that Adams' version of events is supported by Officer Garinger, who saw appellant kiss Adams. Although neither of the two male officers standing nearby saw this kiss take place,

they also claim they did not see the slap, which would lead one to believe that either they were not paying attention to what was transpiring a few feet away, or were not telling the truth as to what they saw. Second, we find it difficult to believe that Adams would make up a story about being grabbed and kissed if she was actually only pinched when there were three witnesses present nearby. Third, given that Adams did not drink that night, and appellant admitted at the hearing that he was feeling the effect of three beers, it is reasonable to assume that Adams' memory of the events might be more reliable.

For these reasons, we find a preponderance of evidence supports the conclusion that appellant grabbed Adams by the buttocks, pulled her close, and tried to kiss her on the lips.

Causes For Discipline

If the last incident at the retirement party had not occurred, the Board does not believe that formal discipline would be appropriate. The parties were engaging in an occasional, mutual exchange of banter as "husband and wife." Appellant's remark to Adams and his route slip to her appear to be meant as attempts at humor in light of their mutual role-playing. While such behavior is silly and inappropriate in the workplace, we do not find it to

be sexually harassing conduct nor serious enough to merit formal adverse action.[3]

In this case, however, appellant took his actions a step too far by grabbing Adams by the buttocks at the retirement party and trying to kiss her. We find that such an action clearly constitutes a failure of good behavior and discourteous treatment of other employees under Government Code section 19572, subdivisions (m) and (t). We further find, however, that under the circumstances of this case, appellant's actions stopped short of constituting sexual harassment under subdivision (w).

As set forth in Rudy Avila (1994) SPB Dec. No. 94-17, departments may discipline employees for sexual harassment if an employee's behavior is severe or pervasive enough to create an abusive working environment for a reasonable woman. There are several factors which are considered in determining whether such an environment has been created, including the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an

[3] As the case in Ted White (1994) SPB Dec. 94-20, such unprofessional horseplay of this nature at work may be disruptive to others and should be immediately dealt with either by counseling or informal means of discipline. If such actions did not halt the behavior, then formal adverse action might be appropriate and necessary. (See Steven Richins (1994) SPB Dec. No. 94-09, page 11 which explains the use of counseling and informal discipline in the application of progressive discipline.)

employee's work performance. Harris v. Forklift Systems, Inc. (1993) 510 U.S. __, 126 L.Ed. 2d 295, 299.

As further set forth in Avila, a single incident or isolated set of incidents does not generally create an abusive or hostile environment. On the other hand, a single physical sexual act might create such an environment depending upon the circumstances.

In Rudy Avila, we found sexual harassment to have occurred when an employee made a sexually suggestive remark to a coworker in front of others, followed a few days later by placing a hand between the coworker's thighs, causing the coworker to jump. In that case, both incidents took place at work, were unwelcome and unprovoked, and caused great emotional and psychological distress to the coworker.

In the instant case, appellant and Adams appeared to have a friendly relationship, which included addressing each other by mock terms of endearment. The incident at issue took place outside of the office at a party where there was testimony that coworkers were exchanging hugs and kisses of affection. When Adams went to leave the party, Officer Garrison attempted to kiss her goodbye on the lips and Adams turned her cheek so that Officer Garrison kissed her goodbye on her cheek. Adams testified that she did not mind such an intimate goodbye from Officer Garrison. Seconds later, appellant went many steps further in saying goodbye to Adams, by grabbing her buttocks, pulling her close to him and attempting to

also kiss her on the lips. Adams slapped appellant and assumed that by this action that she let appellant know her feelings with respect to his behavior and felt that the matter was closed. Although Adams testified that she did eventually request a transfer two months later, it does not appear from the record that Adams felt that her working environment had been rendered hostile and abusive because of this one incident.

While we certainly find appellant's actions in this instance to constitute misconduct and cause for discipline under subdivisions (m) and (t), we do not find that appellant's actions were severe or pervasive enough under these particular circumstances to constitute sexual harassment under subdivision (w).

Penalty

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion; it is not obligated to follow the recommendation of the employing power. Wylie v. State Personnel Board (1949) 93 Cal. App. 2d 838, 843. However, this discretion is not unlimited. Among the factors that

the Board is required to consider are those identified by the California Supreme Court in Skelly v. State Personnel Board (1975) 15 Cal.3d 194 which include, harm to the public service, the circumstances surrounding the misconduct and the likelihood of recurrence.

The Department assessed a 10 working days' suspension against appellant based upon allegations of sexual harassment which included charges of engaging in "public bantering of a sexual nature" with a coworker and grabbing and kissing the coworker. As noted above, the Board finds that the exchanges between the appellant and Adams, including the statement made in front of the coworkers regarding Adams' overnight whereabouts and the note to "Suzi aka honey", were acts which we believe do not in and of themselves constitute sexual harassment. Moreover, we believe that these actions were of such a minor nature that they would have been best dealt with through informal channels.

Since we find that appellant committed only one act worthy of formal discipline out of the several charged, that that act did not constitute sexual harassment, and that appellant has since expressed regret and claims to understand the serious ramifications of his actions, we believe that the original penalty assessed by the Department should be modified. We believe that an Official Reprimand in appellant's personnel file will be sufficient to convince him to immediately alter his behavior. Should appellant

continue to conduct himself in an unprofessional manner towards fellow employees, either inside or outside of work, then more serious adverse action may be necessary.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The adverse action of a 10 working days' suspension taken against Clayton Carter is modified to an Official Reprimand.

2. The Department of Highway Patrol shall pay to Clayton Carter all back pay and benefits that would have accrued to him had he not received a 10 working days' suspension.

3. This matter is hereby referred to an Administrative Law Judge and shall be set for hearing on written request of either party in the event that the parties are unable to agree as to the salary and benefits owing Clayton Carter.

4. This opinion is certfied for publication as a Precedential Decision (Government Code § 19582.5).

*****THE STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not present when this decision was adopted.

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I hereby certify that the State Personnel Board made and adopted the foregoing Resolution and Order at its meeting on July 6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board